FEDERAL RESTRAINTS UPON STATE REGULATION OF RAILROAD RATES OF FARE AND FREIGHT.

I.

INTRODUCTION.

NOTHING in the industrial history of the United States within the present century, phenomenal in many respects as that history has been, surpasses in extent or rapidity the growth of the railroads. When the Constitution of 1789 was adopted, there was no such thing known in the country as a railroad corporation; and, indeed, four decades more were yet to pass before the invention of the steam locomotive. In 1830 there were in the United States 23 miles of track; in 1840, 2,818; in 1850, 9,021; in 1860, 30,626; in 1870, 52,922; in 1880, 93,296; in 1890, 166,690; while in 1894 there were 179,279. In this last year, the number of locomotives employed was 36,293; the number of passenger cars, 27,909; the number of baggage, mail, and express cars, 7,937; and the number of freight cars, 1,191,884; making in all (locomotives and cars included) 1,264,023 pieces of rolling stock. The capital represented by this vast investment amounted to $11,124,930,551, or the sum, on the average, of $62,053 per mile, made up as follows: share capital, $5,075,629,070; bonded debt, $5,665,734,249; and other unfunded debt, $383,567,232.

Litigation over matters relating to railroads, therefore, has not only naturally involved immense sums of money, and the interests of many thousands of investors, but also given rise, oftentimes, to most important questions of constitutional law. Among such questions are those of Federal and State legislative control, and the exact extent of each, and the vested rights of corporations. Many efforts, at different times, have been made by the several States to subject the railroads within their borders to a strict governmental supervision, and to regulate the rates of fare and freight to be charged thereon, while at times the legislation has proceeded so far, that, if constitutional, it would have absolutely wrecked the railroads which it affected. It has been therefore necessary, both for the

security of investors and for the good of the public, that some limitation upon the powers of the State legislatures guilty of such action should exist, and it will be interesting to inquire by what means and in what measure the railroads have escaped these threatened attacks, and to what provisions in the Federal Constitution or its Amendments their success is attributable. It will be found that the sole protection has resided either in the interstate commerce clause of the Constitution or the Fourteenth Amendment thereof relating to due process of law and the equal protection of the laws, and that the provision in the Constitution in regard to the impairment of a charter by a State legislature in the cases that so far have arisen has proved of no avail. It is a peculiar fact, which has often occurred, however, in the development of the history of the Constitution, and which has recently been commented upon by the Supreme Court in *In re* Debs, 158 U. S. 564, 590, that the clauses of the Constitution the interpretation of which has been invoked, although in no sense having changed their meaning, may be sought to be applied to a state of facts which did not exist, and was not contemplated, when the clauses were originally adopted. For example, in the present instance, as has been said, when the interstate commerce clause which forms part of the original Constitution was drafted, there was not a railroad within the whole area of the United States; and, so far as the Fourteenth Amendment to the Constitution, relating to due process of law and the equal protection of the laws, is concerned, that was adopted merely as a consequence of the war, and with a view solely to the *status* of the then recently freed slave. But, nevertheless, constitutional provisions are of universal, and not particular application, and, although unchangeable, operate frequently under different conditions and upon separate states of facts. To cite *In re* Debs, *supra*, at page 590: —

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends

to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

II.

Definition of Interstate Commerce.

It will be most convenient, for present purposes, to define first what transportation by railroad constitutes State, and what interstate commerce; and, in the discussion of the question, to divide such transportation into the following several possible classes: —

(1) Traffic taken up within a State and carried to another point therein; as, for example, a haul from A, in Massachusetts, to B, in Massachusetts.

(2) Traffic taken up within a State and carried to another point therein, but, upon the journey, transported through another State; as, for example, a haul from A, in Massachusetts, to B, in Massachusetts, passing through Vermont.

(3) Traffic through or across a State; as, for example, a haul from C, in Vermont, to D, in Connecticut, through or across Massachusetts.

(4) Traffic taken up inside of a State and carried without; as, for example, a haul from A, in Massachusetts, to C, in Vermont.

(5) Traffic taken up outside of a State and brought within; as, for example, a haul from C, in Vermont, to A, in Massachusetts.

(6) Traffic carried over a road wholly within a State, but in continuous transit from a point without said State to a point within, or from a point within to a point without; as, for example, a haul from A, in Massachusetts, to B, in Massachusetts, or from B, in Massachusetts, to A, in Massachusetts, over a Massachusetts railroad between said A and B, being part of a carriage, however, from C, in Vermont, to A, in Massachusetts, or from A, in Massachusetts, to C, in Vermont, over said Massachusetts railroad and another and separate railroad from said B to said C.

(1) *A, in Massachusetts, to B, in Massachusetts.* There can be no question that a carriage of this character is domestic commerce, and not interstate, and that the same is within the exclusive control of the State. Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois, 118 U. S. 557. Miller, J., in this case, at page 564, says: —

"For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. . . . Both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration [a State statute], it is not subject to the constitutional provision concerning commerce among the States."

The court here was speaking of a carriage in Illinois by an Illinois corporation, but the remarks would have held equally true of a carriage in the State by a United States corporation.[1]

(2) *A, in Massachusetts, to B, in Massachusetts, through Vermont.* A carriage of this character has been decided to be of the same nature as the preceding, and therefore to be State, and not interstate commerce. Lehigh Valley Railroad Co. *v.* Pennsylvania, 145 U. S. 192. The question in issue here was whether a tax by the State of Pennsylvania upon the gross receipts of a Pennsylvania railroad corporation was valid, if such receipts included the Pennsylvania portion of receipts arising from freight transported between two points in Pennsylvania, but in the course of transit carried through New Jersey. It was admitted, in the decision of the court, (*contra*, however, to the principle of State Tax on Railway Gross Receipts, 15 Wall. 284,) that a tax upon gross receipts was the same as a tax based upon the number of tons of merchandise hauled; and that, if the transportation in question consisted of interstate commerce, it was protected by the Constitution from taxation. In other words, the sole issue in the case was whether the facts as established presented a case of interstate commerce, or, to put the inquiry of the court itself, at page 201: —

"Is such intercourse consisting of continuous transportation between two points in the same State made interstate, because in its accomplishment some portion of another State may be traversed?"

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[1] Union Pacific Railway Company *v.* Goodridge, 149 U. S. 680. See also Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 334, 335.

And the court, by Fuller, C. J., answered the proposition in the negative, and held the tax to be constitutional.

The reason given for the decision is not wholly satisfactory, and furnishes no sufficient explanation of the result. An effort was made by the court to distinguish the case from the principle of Coe *v.* Errol[1] and Lord *v.* Steamship Co.,[2] but with questionable success. In the former case the court, by Bradley, J., said: —

"This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution." (p. 525.)

The court, in Lehigh Valley Railroad Company *v.* Pennsylvania, *supra*, commenting upon the statement just quoted, observed: —

"These logs were also in course of transportation from the place of cutting to another place likewise in Maine, and, as that transportation required them to arrive and remain for a time in New Hampshire, the predicament in that regard was referred to in the opinion by way of argument, as being such that New Hampshire could not impose a burden on that transportation. But the right of Maine to tax them was not disputed." (pp. 202, 203.)

It is difficult to understand why, if it was not disputed, it was therefore necessarily admitted, for the question was not discussed at all in the opinion, and the whole reasoning of the case would seem to indicate that Maine had not such a right. The theory which the court had in mind when it said that New Hampshire could not tax Maine logs passing through New Hampshire on the way from one point in Maine to another was, that they became part of interstate commerce from the date that they started in course of transportation; Coe *v.* Errol, *supra;* and if they had become such, it would follow of course that, while in course of transit, they were as much under protection from the laws of Maine as they were from those of New Hampshire. In any event, the effect of the *dictum* is to hold them to be unquestionably removed, after starting upon their journey, from the general mass of prop-

[1] 116 U. S. 517.

[2] 102 U. S. 541.

erty of either State, and therefore free from State control; and there appears no way to reconcile the two cases in this particular.

Lord *v.* Steamship Company,[1] in Lehigh Valley Railroad Co. *v.* Pennsylvania, *supra*, was also distinguished, or rather overruled upon the ground upon which it had been decided, and supported upon another. That was a case in which the issue was whether Congress had the power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of freight and passengers between ports in the same State. Waite, C. J., in delivering the opinion of the court, rested it solely upon the commercial clause of the Constitution, and expressly omitted all reference to the judicial power of the United States over cases of admiralty and maritime jurisdiction. He said: —

"She [the *Ventura*] was navigating among the vessels of other nations, and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was while on the ocean engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

The terms of the contract of carriage, therefore, were held to be subject to the control of Congress, and that although the transportation was between ports in the same State. The question, it is true, affected an instrument of commerce as well as a mere contract for carriage, but the reason that the transportation was held a transaction of interstate commerce was that the carriage was upon the high seas out of the jurisdiction of the State. It does not differ in principle from the case of goods passing out of a State and into it again while in continuous transit between two points in the same State, and if it is good law, Lehigh Valley Railroad Co. *v.* Pennsylvania, *supra*, is not. Undoubtedly, however, as the court says in the latter case, the decision can be justified on the principle of *In re* Garnett,[2] by holding the statute a modification by Congress of the general admiralty and maritime law, and the case is perhaps more properly based upon that

[1] 102 U. S. 541.

[2] 141 U. S. 1.

ground. Nevertheless, there is no reason to say that it was improperly decided on the theory upon which the court rests it, or that a carriage of freight or passengers through one State in the course of a transportation between two points in another is not *ex necessitate* interstate commerce within the meaning of the Constitution. So far, however, as the *powers of taxation* of the State of the two *termini* are concerned, it must now be conceded that they have been specifically declared to extend to the *intrastate* part of the gross receipts from such a carriage without an invasion of the commercial clause of the Constitution.[1]

(3) *C, in Vermont, to D, in Connecticut, through or across Massachusetts.* This is plainly interstate commerce.[2]

(4) *A, in Massachusetts, to C, in Vermont.*

(5) *C, in Vermont, to A, in Massachusetts.*

There was never any question that the preceding two cases present instances of interstate commerce.[3]

(6) *A, in Massachusetts, to C, in Vermont, or C, in Vermont, to A, in Massachusetts, passing over a Massachusetts railroad, A to B, situate wholly within Massachusetts.* This case is presented in Norfolk & Western Railroad Co. *v.* Pennsylvania,[4] where the plaintiff in error was a corporation organized under the laws of both Virginia and West Virginia, with its road situate entirely within those States, but forming part of a through line starting in Pennsylvania and known as the Great Southern Despatch. The court said, at page 119: —

"That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business — that is, the business of this through line of railroad — is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line."

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[1] Lehigh Valley Railroad Co. *v.* Pennsylvania, *supra.*

[2] Reading Railroad Co. *v.* Pennsylvania, 15 Wall. 232, 280; Fargo *v.* Michigan, 121 U. S. 230, 241.

[3] Reading Railroad Co. *v.* Pennsylvania, 15 Wall. 232, 280; Fargo *v.* Michigan, 121 U. S. 230, 241; Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

[4] 136 U. S. 114.

III.

State Regulation of Interstate Rates of Fare and Freight.

The question of regulation of interstate rates of fare and freight by a State first arose in the Granger Cases, so called, decided by the Supreme Court in 1876.[1] The judges were divided in their opinions, Waite, C. J., Clifford, Miller, Bradley, Swayne, Davis, and Hunt, JJ., uniting as the majority of the court, and Field and Strong constituting the minority.

The first of the above cases, Chicago, Burlington, & Quincy Railroad Co. *v.* Iowa,[2] involved the constitutionality of an act of the legislature of Iowa, establishing "reasonable maximum rates of charges for the transportation of freight and passengers" over the different railroads in Iowa. The complainant in the case was the lessee of the Burlington and Missouri River Railroad, which was incorporated under the laws of Iowa, and wholly situate therein, although it was also engaged in interstate as well as intrastate commerce. The question in issue, among others, was whether such a statute was necessarily unconstitutional, as being in conflict with the interstate commerce clause of the Constitution and the powers conferred thereunder upon Congress. The court, upon this point, said: —

"The objection that the statute complained of is void, because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of Munn *v.* Illinois [94 U. S. 113]. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in interstate commerce, and until Congress acts the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."

That is to say, the broad doctrine was here laid down, that until Congress acted the several States had plenary control over the

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[1] Chicago, Burlington, & Quincy Railroad Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago & Northwestern Railway Co., 94 U. S. 164; Lawrence *v.* Chicago & Northwestern Railway Co., *ib.*; Chicago, Milwaukee, & St. Paul Railroad Co. *v.* Ackley, 94 U. S. 179; Winona & St. Peter Railroad Co. *v.* Blake, 94 U. S. 180; Southern Minnesota Railroad Co. *v.* Coleman, 94 U. S. 181; and Stone *v.* Wisconsin, 94 U. S. 181.

[2] 94 U. S. 155.

regulation of railroad rates and fares, whether the same concerned interstate commerce or State commerce only.

Peik *v.* Chicago & Northwestern Railway Co.,[1] raised the question of the constitutionality of an act of the State of Wisconsin, fixing maximum rates of fare and freight. It was decided in the same manner upon the interstate commerce point as the preceding case. The railroad company here was incorporated under the laws of Wisconsin, and was engaged in interstate as well as intrastate commerce. The court said: —

"As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, this may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

And in another portion of the decision, the court, in defining the matter at issue, said: —

"These suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, *or taken up outside the State and brought within it, or taken up inside and carried without.*"

That is to say, the effect of the statute upon interstate commerce as well as State commerce was directly in issue, and one of the matters decided.

Chicago, Milwaukee, & St. Paul Railroad Co. *v.* Ackley,[2] related to a Wisconsin railroad, and presented no new point. Winona & St. Peter Railroad Co. *v.* Blake,[3] Southern Minnesota Railroad Co. *v.* Coleman,[4] and Stone *v.* Wisconsin,[5] were all cases of Minnesota corporations, and were decided on the same grounds as the foregoing.

The dissenting opinion in the Granger Cases[6] did not discuss

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[1] 94 U. S. 164.
[2] 94 U. S. 179.
[3] 94 U. S. 180.
[4] 94 U. S. 181.
[5] 94 U. S. 181.
[6] 94 U. S. 181, 183.

the effect of the commercial clause of the Constitution, and therefore adds nothing to the present inquiry.

The Railroad Commission Cases,[1] decided in 1885, come next in order, but are inconclusive upon the question here, although they manifest no change as yet in the opinion of the court. These cases consist of Stone *v.* Farmers' Loan & Trust Co.[2]; Stone *v.* Illinois Central Railroad Co.[3]; and Stone *v.* New Orleans & Northeastern Railroad Co.[4]

Stone *v.* Farmers' Loan & Trust Co.[5] related to an act of the State of Mississippi, providing for the regulation of freight and passenger rates on railroads in that State, and creating a commission to supervise the same. The company affected was the Mobile and Ohio Railroad Company, a corporation which had been organized under the laws of Alabama, Mississippi, Tennessee, and Kentucky, being the several States through whose territory the Company's road passed. The court, by Waite, C. J., concerning the Federal question, said: —

"Every person, every corporation, everything within the territorial limits of a State, is, while there, subject to the constitutional authority of the State government. Clearly, under this rule, Mississippi may govern this corporation, as it does all domestic corporations in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."

And again: —

"The commission is, in express terms, prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of persons or property taken up without the State and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the State over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress, and the general powers of the State in this particular, is not

[1] 116 U. S. 307.
[2] 116 U. S. 307.
[3] 116 U. S. 347.
[4] 116 U. S. 352.
[5] 116 U. S. 307.

everywhere distinctly marked, and it is always easier to determine when a case arises whether it falls on one side or the other, than to settle in advance the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

As will be at once seen, the case went off on questions other than the Federal question concerning the scope of the commercial clause of the Constitution; while the dissenting opinions of Field and Harlan, JJ., dealt with yet other aspects of the controversy.

Stone *v.* Illinois Central Railroad Co.,[1] and Stone *v.* New Orleans & Northeastern Railroad Co.,[2] involved no questions which are of importance to the present inquiry, and need not be considered under this head.

In 1886, Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois,[3] came before the Supreme Court, and in it the prior cases were carefully reviewed. The controversy arose over a statute of Illinois, providing a penalty for any railroad company charging or receiving, within that State, for transporting passengers or freight of the same class the same or a greater sum for any distance than it did for a longer. The defendant had made such discrimination in regard to goods transported from Peoria, Illinois, and Gilman, Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, although the former place was eighty-six miles nearer to New York. The Illinois act was held unconstitutional, so far as it applied to such commerce, notwithstanding that in its operation it was limited to that part of the voyage which lay within the State of Illinois. The court, by Miller, J., said: —

"If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to

[1] 116 U. S. 307. [2] 116 U. S. 352. [3] 118 U. S. 557.

regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States."

But, on the *contra*, in relation to interstate commerce, the opinion, in summing up, said: —

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court, that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the States is a valid law."

The result of this decision was practically to overrule the Granger Cases, and the court merely differentiated this case from those by saying that the main point considered in the latter was not the commerce clause in the Constitution, but the provisions of the Fourteenth Amendment, and the further clause of the Constitution relating to impairment of contracts by a State, and that it was never the intention of the court consciously to hold that a regulation of interstate rates of fare and freight was within the powers of a State. On this subject the court said: —

"And the question how far a charge, made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. . . . And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges. [That is, the effect of the Fourteenth Amendment.] . . . The railroad companies set up another defence, apart from denying the general right of the legislature to regulate transportation charges, namely, that in their charters from the States, they each had a contract, express or implied, that they might regulate and establish their own fares and rates of transportation. [That is, a vested charter right.] These two questions were of primary importance; and though it is true that, as incidental or auxiliary to these, the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the State, was presented,

it received but little attention at the hands of the court, and was passed over with the remarks in the opinions of the court which have been cited."

The judges concurring in the majority opinion were Miller, Field, Harlan, Woods, Matthews, and Blatchford, of whom Miller, J. alone took part in the decision of the Granger Cases; while those joining in the dissenting opinion were Bradley, J., Waite, C. J., and Gray, J., of whom Waite, J. and Bradley, J. took part in the Granger Cases, and with Miller at that time united in the majority opinion therein. The dissenting opinion of the three justices in the present case was based strictly upon the proposition, that Peik *v.* Chicago & Northwestern Railway Co.,[1] was conclusive of the subject, and that, until Congress acted, the States had power to prescribe rates of railroad fare and freight, so far as the same concerned interstate commerce. To quote the dissenting opinion reported in 118 U. S. 577, 588: —

"To sum up the matter in a word: we hold it to be a sound proposition of law, that the making of railroads, and regulating the charges for their use, is not such a regulation of commerce as to be in the remotest degree repugnant to any power given to Congress by the Constitution, so long as that power is dormant, and has not been exercised by Congress. They affect commerce, they incidentally regulate it; but they are acts in relation to the subject which the State has a perfect right to do, subject always to the controlling power of Congress over the regulation of commerce when Congress sees fit to act."

The case of Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois[2] was cited without disapproval, in 1886, in Fargo *v.* Michigan[3]; and, in 1887, in Bowman *v.* Chicago & Northwestern Railway Co.,[4] and Dow *v.* Beidelman.[5] It was also cited with express approval, in 1893, in Covington & Cincinnati Bridge Co. *v.* Kentucky,[6] in these words: —

"In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash case*, and to that doctrine we still adhere."

It may, therefore, be taken as well settled law to-day, that the States have no power of regulation over the charges for trans-

[1] 94 U. S. 164.
[2] 118 U. S. 557.
[3] 121 U. S. 230, 247.
[4] 125 U. S. 465, 494.
[5] 125 U. S. 680, 689.
[6] 154 U. S. 204, 217.

portation of interstate traffic, whether of passengers or freight. And such would be the case, if the Federal interstate commerce act were repealed.

IV.

State Regulation of State Rates of Fare and Freight.

It remains to inquire whether, in the absence of a restriction upon the powers of a State by virtue of the commerce clause of the Constitution, there is any other restriction under the Constitution which can control such powers of the State, and here again there will be seen a gradual shifting away from the earlier decisions of the court, and a perceptible extension in the interpretation of the powers of the nation.

First, with regard to the provisions of the Fourteenth Amendment to the Constitution relating to due process of law, and the equal protection of the laws.

It was held, in Chicago, Burlington, & Quincy Railroad Co. *v.* Iowa,[1] that, whenever the legislature saw fit to prescribe the maximum charge, the reasonableness of that charge could not be inquired into, but was finally determined by the act of the legislature. The court said, speaking of a railroad as a common carrier: —

"It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in, and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. [That is to say, it is conclusive. Munn *v.* Illinois, 94 U. S. 113.] It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."

Peik *v.* Chicago & Northwestern Railway Co.[2] expressed a similar doctrine, holding as follows: —

[1] 94 U. S. 155.

[2] 94 U. S. 164.

"Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."

The doctrine was even more fully illustrated in Chicago, Milwaukee, & St. Paul Railroad Co. *v.* Ackley.[1] Here, the plaintiff, a railroad company incorporated in Wisconsin, had sought to recover for the transportation of property more than the maximum rate fixed by law for freight, by showing that the amount charged by the company was no more than a reasonable compensation for the services rendered, or, in other words, that the maximum rate fixed by the State was unreasonable. But such proof was held inadmissible, upon the theory that the decision of the legislature in the premises was final.

Ruggles *v.* Illinois[2] also is authority for a like proposition. It was there said: —

"This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common law limitation of reasonableness, for in the absence of a statute, or other appropriate indication of the legislative will, the common law forms part of the laws of the State to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that, when a maximum is so established, the rates fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws."

Justice Harlan concurred, but based his opinion upon other grounds, for he plainly was of opinion that the legislative determination of the question of reasonableness was not properly conclusive. Judge Field concurred, only because there was no proof made that the rate prescribed by the legislature was unreasonable, and, in the absence of proof, the presumption was that it was reasonable.

Furthermore, it was decided, in Chicago, Burlington, & Quincy Railroad Co. *v.* Iowa,[3] that this right of regulation in the State was not lost by non-user; in Ruggles *v.* Illinois,[4] that the grant away by a State of such a right was never to be presumed; and

[1] 94 U. S. 179.
[2] 108 U. S. 526.
[3] 94 U. S. 155.
[4] 108 U. S. 526.

in Stone *v.* Farmers' Loan & Trust Co.,[1] that words of positive grant, or those equivalent in law, were necessary.

In Stone *v.* Farmers' Loan & Trust Co.,[2] a majority of the court, through Waite, C. J., held, as before, that the State had authority to fix maximum rates of charges for transportation by railroad companies when the State was not expressly forbidden to do so by their charter contracts. The doctrine of the case, however, was somewhat modified by the statement that the extent of the power of the State was not unlimited, and was a subject, under certain circumstances, for the determination of the court. The opinion said: —

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law."

Judge Harlan and Judge Field dissented, as in Ruggles *v.* Illinois, *supra*, although upon somewhat special grounds, and not for reasons here important.

In Dow *v.* Beidelman [3] it was decided that a statute of Arkansas, fixing at three cents a mile the maximum rate of fare upon a railroad, was not a taking of property without due process of law, even if, under an enforcement of such a statute, the net yearly income of the railroad fell to less than $1\frac{1}{2}\%$ on the original cost of the road, and to only a little more than 2% on the amount of the bonded debt; that is to say, at least if there were no proof of the cost of this bonded debt, or the amount of the capital stock of the reorganized corporation, or the price paid by such corporation for the road. The case was put upon the distinct ground that the legal limitation of charge had not been proved to be unreasonable, and is a distinct departure from the doctrine of the Granger Cases.

In Chicago, Milwaukee, & St. Paul Railway Co. *v.* Minnesota,[4] a statute of Minnesota was held unconstitutional, which provided that the rates of charges for the transportation of property recom-

[1] 116 U. S. 307.
[2] *Ibid.*
[3] 125 U. S. 680.
[4] 134 U. S. 418.

mended and published by the State Railroad Commission should be final and conclusive as to what were equal and reasonable charges, and which allowed of no judicial inquiry before the commission, or otherwise, as to the reasonableness of said rates. The majority opinion, written by Blatchford, J., contains the following: —

"In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company, and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law."

Miller, J. concurred in a special opinion, and Bradley, Gray, and Lamar, JJ. dissented, saying, through Bradley, J., that the question was a legislative question, and not a judicial one, and expressing the opinion that the decision overruled the doctrine of the Granger Cases, as it undoubtedly does.

The principle of the preceding case, however, has never since been overruled, but, on the contrary, has been several times expressly approved.

For instance, in Chicago & Grand Trunk Railway Co. *v.* Wellman,[1] it was the opinion, that, while the legislature has power to fix rates, the right of judicial interference extends to a case of unreasonable rates.

And such is the doctrine of Reagan *v.* Farmers' Loan & Trust Co.,[2] where the cases upon the subject are reviewed by Brewer, J., who, however, is somewhat inaccurate in his expression of the scope of the decision in the Granger Cases. He there says: —

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons

[1] 143 U. S. 339, 344.

[2] 154 U. S. 362.

or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized, that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. [But see Chicago, Burlington, & Quincy Railroad Co. *v.* Iowa, 94 U. S. 155, and Chicago, Milwaukee, & St. Paul Railroad Co. *v.* Ackley, 94 U. S. 179.] The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

The same principle was also upheld in St. Louis & San Francisco Railway Co. *v.* Gill,[1] where the court says: —

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. Railroad Commission Cases, 116 U. S. 307, 331; Dow *v.* Beidelman, 125 U. S. 681; Chicago, Milwaukee, &c. Railway *v.* Minnesota, 134 U. S. 418; Chicago & Grand Trunk Railway *v.* Wellman, 143 U. S. 339; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362."

And it was further decided, that the question of unreasonableness must be determined by the effects of the regulation by the State upon the earnings of the entire line of railroad within the State, as against all its legitimate expenses therein.

Secondly, with regard to the provisions of the Constitution relating to impairment of contracts by legislation of a State.

In Chicago, Burlington, & Quincy Railroad Co. *v.* Iowa,[2] the

[1] 156 U. S. 649.

[2] 94 U. S. 155.

charter of the railroad involved, namely, the Burlington and Missouri River Railroad (wholly within Iowa), gave the latter power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but, on the other hand, subjected the said company at all times to such rules and regulations as the General Assembly of Iowa might see fit to enact. There was no special provision in the charter with reference to the fixing of rates by the railroad company, and the law as applicable under the circumstances was laid down as follows: —

"This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in, and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business."

That is to say, where the grant to contract was general, and there was a power of amendment reserved in the State, a railroad company was subject to regulation by the State with regard to its State rates of fare and freight.

In Peik *v.* Chicago & Northwestern Railway Co.,[1] the charter provisions of a Wisconsin railroad entitled it "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall [should] deem reasonable." The Constitution of Wisconsin in force when these provisions were enacted provided for the alteration or repeal by the legislature of all acts for the creation of State corporations. It was held in the decision, that said charter provisions, by their express grant, placed no limitation upon the powers of the State, and that the legislature thereof could prescribe a maximum of charges for the transportation by the corporation of persons or property within the State, or taken up outside the State and brought within, or taken up inside and carried without. Lawrence *v.* Same[2] presented identically the same question, and was similarly decided.

In Winona & St. Peter Railroad Co. *v.* Blake,[3] the railroad company was incorporated as a common carrier, with all the rights,

[1] 94 U. S. 164. [2] 94 U. S. 164. [3] 94 U. S. 180.

and subject to all the obligations, as such. It was bound by common law, by its charter, and by the Constitution of Minnesota to carry passengers and freight for a reasonable compensation, but such obligation, the court held, in no wise added to or subtracted from the powers of the State, and the case was placed upon the same ground as the foregoing. Southern Minnesota Railroad Co. *v.* Coleman [1] was precisely similar.

In Stone *v.* Wisconsin,[2] there was a provision in the charter of the railroad company giving the State the right of alteration or repeal; and in this particular the case was like Peik *v.* Chicago & Northwestern Railway Co.[3] Even if, therefore, the legislature had granted the railroad company power to fix rates of fare and freight, the reserved rights of the State would have enabled it to effect an amendment.

In Ruggles *v.* Illinois,[4] the charter of the company provided that it should have the power to make such by-laws, rules, and regulations as were deemed necessary, provided that the same were not repugnant to the Constitution and laws of the United States, or the State; and, further, that the board of directors should have authority to establish such rates of toll as they should from time to time determine advisable by their by-laws. It was here held that the State had not parted with its right of control, inasmuch as a grant thereof was never to be presumed.

In Stone *v.* Farmers' Loan & Trust Co.,[5] the railroad charter conferred upon the incorporators power "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation." The directors were also empowered to make by-laws, rules, and regulations touching the disposition and management of the company's property, and all matters appertaining to its concerns. It did not appear that there was anything here to show a special contract with the State exempting the railroad from State regulation, and therefore the State was held to have retained its ordinary legislative control. The court said: —

"Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was."

In Stone *v.* Illinois Central Railroad Co.,[6] the language used in

[1] 94 U. S. 181.
[2] 94 U. S. 181.
[3] 94 U. S. 164.
[4] 108 U. S. 526.
[5] 116 U. S. 307.
[6] 116 U. S. 347.

conferring the powers corporate was, that the president and directors may "adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper," and the same "alter and change at pleasure." This case was held to be entirely similar to the preceding, and was decided in the same way.

In Chicago, Milwaukee, & St. Paul Railway Co. *v.* Minnesota,[1] the charter of the railroad company authorized the directors thereof to make needful rules and regulations touching the rates of toll, and the manner of collecting the same, but it was held that such a grant did not deprive the State of its right of legislative supervision.

In St. Louis & San Francisco Railway Co. *v.* Gill,[2] it was decided that a special statutory exemption or privilege, such as immunity from taxation, or a right to fix and determine rates of fare, does not accompany the property of a railroad company in its transfer to a purchaser, in the absence of an express direction in the statute to that effect.

V.

CONCLUSION.

The following deductions may be made from the present state of the law in relation to charges for passengers and freight:

Interstate Transportation.

1. That the State, even in the absence of Federal legislation, cannot pass laws regulating interstate transportation.

2. That interstate transportation consists of the following: —

(*a*) Traffic taken up within a State and carried without, or taken up without and carried within;

(*b*) Traffic taken through or across a State;

(*c*) Traffic on a road wholly within a State, but in transit from one State to another.

3. That it does not consist of: —

(*a*) Traffic taken up within a State and carried to another point therein;

(*b*) Traffic taken up within a State and carried to another point therein, but upon the journey transported through another State; that is, at least, so far as relates to State taxation of the intrastate portion of the gross receipts from such a carriage.

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[1] 134 U. S. 418. [2] 156 U. S. 649.

State Transportation.

1. That a State, in the matter of intrastate traffic, retains power of control over the same, unless said control has been bargained away by express grant.

2. That the presumption always is against such grant.

3. That a State, in the exercise of its power of control, is prohibited by the Constitution of the United States from reducing fares or freights below reasonable rates, and that the Federal courts, and not the State legislatures, are to be the final judges of what is reasonable.

The result is, therefore, that a very large measure of protection is afforded to the railroads through the medium of the Federal Constitution. So far as interstate commerce is concerned, no State can interfere with that, for it lies exclusively within the national domain; while, so far as relates to State commerce, that is subject to the limitation that no State, under cover of legislation, can deprive a railroad of its property without due process of law, or deny it the equal protection of the laws. As has been seen, the Supreme Court did not arrive at this conclusion at once, or without something of hesitation. When, in 1876, the Granger Cases were decided, there was not that disposition to give the clauses of the Constitution the ample breadth of construction which they have since received. The propriety of the change in the Court's attitude, however, cannot be doubted. Possibly nothing has done more to sustain the value of American railroad securities, or to create greater confidence therein, than the knowledge that beyond and above the sovereign power of the State there is the supreme authority of the nation over interstate as well as foreign commerce; while beyond and above that is the ultimate, final doctrine of vested rights, which neither State nor nation, jointly or separately, can invade or impair. Constitution, Art. I., section 8, clause 3; Amdt. XIV., clause 1; Amdt. V.

William F. Dana.